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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JIM BASS HOLDEN,

Petitioner(s),

vs.

STATE OF NEVADA, et al,

Respondent(s).

Case No. 2:14-cv-0894-APG-PAL

MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS

INTRODUCTION

Respondents, by and through counsel, ADAM PAUL LAXALT, Attorney General of The State of Nevada, and MICHAEL J. BONGARD, Deputy Attorney General, hereby respond to Petitioner JIM BASS HOLDEN's (HOLDEN) Petition For Writ Of Habeas Corpus. This motion is based upon the following points and authorities, the exhibits filed in this matter, and all the documents and pleadings on file in this case.

PROCEDURAL HISTORY

I. Justice Court Proceedings, Las Vegas Township Justice Court

On April 26, 2004, the State filed an amended criminal complaint charging HOLDEN with murder with use of a deadly weapon, burglary while in possession of a firearm, conspiracy to commit murder and extortionate collection of a debt. Exh 34.[1]

[1] Exhibits filed with the first amended petition are referenced by their number and page number assigned by the Court's ECF system. Exhibits 33 and higher refer to exhibits filed with this pleading. Some exhibits, such as Exhibit 35, are refiled because the exhibit filed by the petitioner did not contain an entire copy of the proceedings.

The justice court conducted a preliminary hearing on April 26, 2004. Exh 35. At the conclusion of that hearing, the justice of the peace bound the defendant to district court on all charges. Exh 36.

II. Trial Court Proceedings, Eighth Judicial District Court

On April 28, 2004, the State filed a criminal information. ECF 16-6. On May 11, 2004, HOLDEN entered a not guilty plea at his arraignment and waived his speedy trial. ECF 16-7 at 5.

On May 17, 2004, HOLDEN was transported for a psychological review. Exh 37. On June 21, 2004, the State requested handwriting exemplars. Exh 38. On November 15, 2004, and October 10, 2005, HOLDEN requested continuances. Exh 39. The State filed an opposition to the October request for continuance. Exh 40. HOLDEN filed a reply on October 24, 2005. Exh 42. On October 24, 2005, the trial court left the trial on calendar, but indicated that it would likely be continued. Exh 43.

On April 21, 2006, the State filed a motion in limine regarding the use of the defendant's journal, and to admit the prior testimony of a State's witness. ECF 16-8, 16-9. On May 1, 2006, HOLDEN filed oppositions to the State's motions in limine. ECF 16-10, 16-11.

On April 25, 2006, HOLDEN filed a motion in limine to preclude references to the deceased as "victim," to exclude hearsay, to preclude references to defendant's prior felony convictions, and a motion to suppress statements. Exhs 44-47. The State filed oppositions to the defense motions on April 28, 2006. Exhs 48-51. The State filed a notice of witnesses on April 28, 2006. Exh 52. HOLDEN filed notice of witnesses on May 2, 2006. Exh 53.

On May 4, 2006, the trial court held hearings on the pending motions. ECF 16-12.[2]

On May 8, 2006, the State filed an amended information, and a second amended information on May 12, 2006. Exh 16-13, 16-15. HOLDEN filed a waiver of right to jury sentencing and a witness notice on May 8, 2006. Exhs 54-55. The State filed a motion in limine on May 9, 2008. Exh 56.

Trial began on May 8, 2006 and continued through May 11, 2006. Exhs 59-62. The jury found HOLDEN guilty of: burglary in possession of a firearm; conspiracy to commit murder; extortionate collection of debt, and; first degree murder with use of a deadly weapon. ECF 16-14.

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[2] The State located the missing witness, so the motion to use prior testimony was not heard. *Id* at transcript 5. The motion to prevent hearsay was reserved. *Id* at transcript 8. The motion to prevent admission of prior felonies was denied. Id at transcript 21. The motion to preclude reference to the decedent as "victim" was denied. Id at transcript 22. The trial court denied the motion to suppress statements. *Id* at transcript 82-83. The motion to admit the journal was granted in part. Id at transcript 52-66.

HOLDEN filed a sentencing memorandum on June 2, 2006. Exh 63. On June 14, 2006, the clerk filed a request and order for funds for a Dr. Davis, which the trial court signed on May 11, 2006. Exh 64.

HOLDEN appeared for sentencing on June 7, 2006. Exh 65. The trial court imposed the following sentence: Count 1, burglary with a weapon, a maximum of one hundred twenty (120) months with parole eligibility after twenty-four (24) months; Count 2, conspiracy to commit murder, a maximum of one hundred twenty (120) months with parole eligibility after twenty-four (24) months, concurrent with Count 1; Count 3, extortionate collection of a debt, a maximum of forty-eight (48) months with parole eligibility after twelve (12) months, concurrent to Counts 1 and 2, and; Count 4, murder with use of a deadly weapon, life without the possibility of parole plus an equal and consecutive term of life without the possibility of parole for use of a deadly weapon, concurrent to Counts 1-3, and the sentence in this case was ordered to run consecutive to the sentences in C202943 and C214716. ECF 16-2.

HOLDEN filed a notice of appeal on July 14, 2006. Exh 66.

III. Direct Appeal Proceedings, Nevada Supreme Court

On May 31, 2007, HOLDEN filed his opening brief. ECF 16-17. On appeal, HOLDEN raised the following claims:

1. Appellant's Due Process right, under the 14th Amendment, was violated when the prosecution characterized the deceased as a "victim;"
2. Appellant's Due Process right, under the 14th Amendment, was violated when the court did not allow appellant's expert witness to testify at trial;
3. Appellant's Due Process right, under the 14th Amendment, was violated when the court took judicial notice of a witness' prior in court identification of a co-conspirator;
4. Appellant's Due Process right, under the 14th Amendment, was violated when the court allowed testimony of witness Dr. Olson without proper foundation.

Id.

The State filed the answer brief on July 5, 2007. Exh 67. HOLDEN filed the reply brief on August 31, 2007. Exh 68.

On October 17, 2007, the Nevada Supreme Court affirmed HOLDEN's convictions. ECF 16-18.

Remittitur issued on November 13, 2007. Exh 69.

IV. State Habeas Corpus Proceedings, Eighth Judicial District Court

On August 23, 2008, HOLDEN filed his state habeas corpus petition. ECF 16-19. On September 8, 2008, HOLDEN filed a motion for appointment of counsel and request for evidentiary hearing. Exh 70. October 23, 2008, the State filed a response to the petition. Exh 71.

On November 25, 2008, the district court appointed counsel for HOLDEN. Exh 72.

On April 9, 2010, HOLDEN filed a counseled supplemental petition. Exh 73.[3] On June 29, 2010, the State filed a response to the supplemental petition. Exh 74.

On October 6, 2010, the court set the matter for an evidentiary hearing. Exh 75. The evidentiary hearing began on March 18, 2011, but was continued to allow trial counsel to review the record. Exh 76.

On April 13, 2012, the court conducted the evidentiary hearing. Exh 77. At the conclusion of that hearing, the court found that HOLDEN failed to demonstrate that counsel was ineffective at trial or on appeal. Id. at transcript 86. The clerk filed the written order on July 5, 2012, and filed the notice of entry on July 10, 2012. Exh 78.

On August 8, 2012, the district court appointed counsel on appeal. Exh 79.

HOLDEN filed a notice of appeal on July 25, 2012. Exh 80.

V. State Habeas Corpus Appellate Proceedings, Nevada Supreme Court

On February 27, 2013, HOLDEN filed his opening brief. ECF 16-26. On appeal, HOLDEN raised the following claims:

1. Whether the district court erred in not granting HOLDEN's petition for writ of habeas corpus;
2. Whether defense counsel was ineffective in advising HOLDEN to testify when testifying opened the door for the State to introduce evidence of his prior convictions and journal entries;
3. Whether defense counsel failed to properly handle the issue of the State's witness introducing evidence of HOLDEN's custodial status;
4. Whether defense counsel failed to request a limiting instruction prior to introduction of HOLDEN's journal's other bad act evidence and appellate counsel was ineffective in failing to properly raise the issue that the district court erred in admitting the journal's other bad [act] evidence;

[3] HOLDEN' filing at ECF 16-23 did not include exhibits.

5. Whether defense counsel was ineffective by conceding HOLDEN's guilt during jury selection and closing argument;

6. Whether defense counsel was ineffective in failing to request jury instructions that reflected his theory of the defense and failed to object during the State's closing argument when prosecutors mischaracterized the law and thereby confused the meaning of the jury instructions;

7. Whether appellate counsel was ineffective in failing to raise the issue of inadmissible hearsay evidence being admitted against HOLDEN in violation of *Bruton* and the Sixth Amendment;

8. Whether defense counsel was ineffective for failing to object to prosecutorial misconduct during closing arguments, and appellate counsel was ineffective for failing to raise this issue on appeal;

9. Whether defense counsel was ineffective in failing to prepare for trial by investigating and fully raising the issue of whether HOLDEN's statement to police should be suppressed for a Miranda violation, and appellate counsel was ineffective for failing to raise the issue on appeal;

10. Whether defense counsel was ineffective in failing to present expert and lay testimony to challenge the reliability of the(sic) Holden's statements made during the police interrogation;

11. Whether combined derelictions by trial counsel and those of appellate counsel warrant relief.

Id.[4]

On March 29, 2013, the State filed the answering brief. Exh 82. On April 30, 2013, HOLDEN filed a reply brief. Exh 83.[5]

On May 13, 2014, the Nevada Supreme Court affirmed the denial of HOLDEN's state habeas petition. ECF 16-27. Remittitur issued on June 11, 2014. Exh 69.

VI. Federal Habeas Proceedings.

HOLDEN mailed his initial federal habeas petition on May 27, 2014. ECF 7. In that petition, HOLDEN raised the following claims:

> Ground 1: Allowing the prosecution to refer to the deceased as "victim" in a case of self-defense creates an inference of guilt and denies the defendant's due process right to a fair trial;

. . .

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[4] Exhibit 81 consists of the indices of the appendix and supplemental appendix filed by HOLDEN.
[5] Exhibit 84 consists of the order striking a pleading from the record on appeal of HOLDEN's state habeas petition and.

> Ground 2: Defendant testified at trial that his confession to law enforcement was a lie to protect his family from the two Hispanic perpetrators. The defendant requested the opportunity to call witness Dr. Davis as an expert in the field of false confessions, but the trial court denied the witness;
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> Ground 3: Due process violation when the court took judicial notice of a witness' prior identification of a co-conspirator;
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> Ground 4: The trial court allowed testimony of Dr. Olson without proper foundation;
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> Ground 5: Ineffective assistance of counsel at trial and on appeal;
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> Ground 6: Trial counsel failed to properly investigate witnesses, or material evidence, and did not seek out an expert. Counsel failed to provide to the jury evidence of a deal with an informant;
>
> Ground 7: Trial counsel failed to object to the misconduct of the prosecutor in the opening and closing statements;
>
> Ground 8: Trial counsel failed to perform a reasonably competent investigation before trial, failing to find the actual shooter in this case, failed to test HOLDEN's hands and clothing, and failing to point out that the weapon was not found at the scene but at the house of the shooter;
>
> Ground 9: Trial counsel was ineffective in allowing the State to use jailhouse snitch Steven Hall;
>
> Ground 10: Ground six of the habeas presented to the district court;
>
> Ground 11: Ground Seven of habeas presented to the district court;
>
> Ground 12: Effective assistance of counsel "adopting grounds raised by appellate attorney Connolly."

ECF 7.

HOLDEN also filed a motion for appointment of counsel. ECF 2.

On June 10, 2014, the Court granted the motion for appointment of counsel. ECF 7. The federal public defender filed a notice of conflict on July 7, 2014. ECF 9. On August 28, 2014, the Court appointed counsel. ECF 12.

On October 29, 2014, HOLDEN filed a counseled, first amended petition. ECF 16. In that petition, HOLDEN raised the following claims:

> Ground 1: Appellant's Due Process Right under the 14th Amendment was violated when the prosecution characterized the deceased as a "victim;"

. . .

Ground 2: Appellant's right to present a defense under the 6th Amendment was violated when the court did not allow appellant's expert witness to testify at trial;

Ground 3: Appellant's Due Process right under the 14th Amendment was violated when the Court took judicial notice of a witness' prior "in court" identification of a co-conspirator;

Ground 4: Petitioner's Due Process right under the 14th Amendment was violated when the court allowed testimony of witness Dr. Olson without proper foundation;

Ground 5: The district court erred in denying HOLDEN's petition for writ of habeas corpus;

Ground 6: Trial counsel was ineffective in advising HOLDEN to testify, which would allow his prior convictions to be admitted as impeachment, and in keeping with this strategy, even after the state rested without introducing the contents of HOLDEN's "journal;"

Ground 7: Trial counsel was ineffective in handling the prior conviction issue and burdened HOLDEN's right to appear before the jury as an innocent man;

Ground 8: A.) Trial counsel was ineffective in failing to request a limiting instruction prior to introduction of the journal's order bad act evidence and
B.) Appellant counsel was ineffective in failing to properly raise the issue that the district court erred in admitting the bad act evidence;

Ground 9: Trial counsel was ineffective in conceding his client's possible guilt during jury selection and again during closing argument;

Ground 10: A.) Trial counsel was ineffective in failing to request instructions consistent with his theory of the defense and in failing to object during the State's closing argument when the State mischaracterized the law and thereby confused the meaning of the jury instructions and lessened the burden of proof required to convict;
B.) Appellant counsel was ineffective for failing to raise the issue of the State's improper argument on appeal;

Ground 11: Appellant counsel was ineffective in raising the issue of inadmissible hearsay being admitted against HOLDEN in violation of Bruton;

Ground 12: A.) Trial counsel was ineffective for failing to object to prosecutorial misconduct during closing arguments;
B.) Appellant counsel was ineffective for failing to raise the issue of prosecutorial misconduct on appeal;

Ground 13: A.) Trial counsel was ineffective in failing to prepare for trial by investigating and fully raising the issue of whether HOLDEN's statement to the police should be suppressed for a Miranda violation;

B.) Appellate counsel was ineffective for failing to raise the issue on appeal;

Ground 14: Trial counsel was ineffective in failing to present expert and lay testimony to challenge the reliability of HOLDEN's statements made during the police investigation;

Ground 15: Cumulative error of trial and appellate counsel.

ECF 16.

On October 29, 2014, counsel also filed a motion for stay and a motion for enlargement of time to file a second amended petition. ECF 14-15. On April 14, 2015, the Court granted the motion to stay proceedings. ECF 17.

On May 11, 2015, counsel filed a motion to withdraw. ECF 18. The Court appointed new counsel on February 11, 2016. ECF 19.

On May 3, 2016, counsel filed a motion to reopen the case. ECF 22.

On February 6, 2017, the Court directed Respondents to answer or respond to the petition. ECF 23.

Respondents now file a motion to partially dismiss the petition because HOLDEN's first amended petition presents several unexhausted claims.

ARGUMENT AND LAW

I. Applicable Law

The Anti-terrorism and Effective Death Penalty Act, "AEDPA" governs these proceedings. 28 U.S.C. § 2254. In order to obtain federal habeas relief after the passage of AEDPA, a petitioner must exhaust his claims in state court. 28 U.S.C. § 2254(b)(1)(A). Respondents do not waive exhaustion in these proceedings. Respondents also deny all allegations in the amended petition, with the exception of those factual findings that have been made by Nevada state courts.

II. Exhaustion

Exhaustion of state remedies is a prerequisite to a federal court's consideration of claims presented in a petition for writ of habeas corpus. 28 U.S.C. 2254(b). The exhaustion doctrine is based on a policy of federal-state comity designed to give state courts the initial opportunity to correct alleged constitutional deprivations. See *Picard v. Conner*, 404 U.S. 270, 275 (1971). It requires the habeas petitioner to “fairly present” the “substance” of his federal habeas corpus claim to the state courts. *Anderson v. Harless*, 459 U.S. 4, 6, 103 S.Ct 276, 277 (1982) (per curiam); *Gagne v. Fair*, 835 F.2d 6, 7 (1st Cir. 1987).

The “fair presentation” requirement is only satisfied when the claim has been presented to the highest state court by describing the operative facts and legal theory upon which the federal claim is based. *Anderson*, 459 U.S. at 6; *Batchelor v. Cupp*, 693 F.2d 859, 862 (9th Cir. 1982). Additionally, a state prisoner does not "fairly present" a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim. *Baldwin v. Reese*, 541 U.S. 27, 32, 124 S.Ct 1347, 1351 (2004). If the federal claim has not been so “fairly presented” to the state’s highest court, there is a failure to exhaust. *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994).

When an argument is not framed or considered in federal constitutional terms and only state case law is cited, there is no fair presentation unless the case analyzes a constitutional issue. See *Anderson*, 459 U.S. at 6 n.3, 103 S.Ct. at 277 n.3. A state law issue may not be transformed into a federal constitutional issue merely by asserting a violation of due process. *Langsford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1996).

There is a failure to exhausts if the claim is presented to the state’s highest court but is presented in a procedurally deficient manner. *Castille v. Peoples*, 489 U.S. 346, 351 (1989); *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994). The petitioner has the duty to prove and plead exhaustion. *Sechrest v. Ignacio*, 943 F.Supp. 1245, 1247 (D. Nev. 1996), citing *Williams v. Craven*, 460 F.2d 1253 (9th Cir. 1972).

Waiver of exhaustion by a respondent must be express. 28 U.S.C. § 2254(b)(3). Respondents do not waive exhaustion.

A “mixed petition,” containing both exhausted and unexhausted claims, must be dismissed, or otherwise resolved, pursuant to *Rose v. Lundy*, 455 U.S. 509, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982) and its progeny.

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. . .

III. Holden Presents The Court With A Mixed Petition

A. Ground 3

In Ground Three of his amended federal petition, HOLDEN alleges that he was denied due process when the trial court took judicial notice of a witness' prior identification of a co-conspirator. ECF 16 at 14.

This claim is unexhausted because HOLDEN never presented the claim to the Nevada Supreme Court as a federal issue.

On direct appeal, HOLDEN challenged the district court taking judicial notice of a witness' identification. ECF 16-17 at 18. Supporting his argument, HOLDEN cited NRS 47.130 and a Nevada Supreme Court case, *Occhiuto v. Occhiuto*, 625 P.2d 568 (Nev. 1981). Neither NRS 47.130 nor *Occhiuto* discuss "Due Process," federal case law or the federal constitution. In *Occhiuto*, the Nevada Supreme Court discussed NRS 47.130, and held that the general rule that courts should not take notice of records in other cases "is not so inflexible in its application that under no can judicial notice be invoked to take cognizance of the record in another case." 625 P.2d at 569.

A petitioner cannot transform a state law claim into a federal constitutional claim by citing "due process." *Langsford v. Day*, 110 F.3d at 1389.

In this case, HOLDEN presented the Nevada Supreme Court with a state law claim on direct appeal. HOLDEN never asked the Nevada Supreme Court to analyze the federal component of the state law claim presented on direct appeal by presenting federal constitutional law, nor did he analyze the issue using federal cases or even state cases citing or analyzing federal law. See *Anderson*, 459 U.S. at 6 n.3.

Because HOLDEN failed to present Ground 3 as a federal constitutional claim in state court, his failure to exhaust is readily apparent and inexcusable under AEDPA. A finding HOLDEN failed to exhaust Ground 3 is the only reasonable finding based upon the state court record.

B. Ground 4

In Ground 4 of his amended federal petition, HOLDEN alleges a Due Process violation because the trial court admitted the testimony of the State's expert without proper foundation. ECF 16 at 15.

. . .

The analysis of this claim in order to determine exhaustion is similar to the analysis of Ground 3. In his direct appeal brief, HOLDEN presented the Ground 4 claim with no references to federal law, the federal constitution, or state law that analyzed or applied federal law.

The direct appeal brief cited NRS 51.135, and *Hamm v. Sheriff*, 523 P.2d 1301 (Nev. 1974). ECF 16-17 at 19. *Hamm* was a three page decision that dismissed a case because evidence (two store receipts) was improperly admitted. *Id.* Neither *Hamm* nor NRS 51.135, discuss due process, contain citations to federal law, or conduct a review of a claim under a due process analysis.

Langsford and *Anderson*, as cited above, support a finding that HOLDEN's arguments on direct appeal do not constitution exhaustion of the federal claim presented in the first amended petition.

C. Ground 8(B)

In Ground 8, HOLDEN raises two claims: first, trial counsel was ineffective for failing to request a limiting instruction, and; second, appellate counsel was ineffective for failing to raise the issue on direct appeal. ECF 16 at 18.

In HOLDEN's appeal from the denial of his state habeas petition, HOLDEN's brief never raised the claim, except for a conclusory statement tacked on the end of a lengthy argument that trial counsel was ineffective. ECF 16-26 at 33. This single sentence does not satisfy exhaustion of the appellate counsel claim.

Respondents request the Court find that HOLDEN's Ground 8(B) ineffective assistance of appellate counsel claim is unexhausted.

IV. Ground 5 Fails To State A Claim

In Ground 5 of the amended federal petition, HOLDEN alleges "the district court erred in denying HOLDEN's petition for writ of habeas corpus."[6] ECF 16 at 15.

Review of HOLDEN's federal claims are conducted pursuant to AEDPA and a claim that the state district court erred in denying the state petition is not properly before this Court as a stand-alone claim.

. . .

[6] Respondents are not certain that HOLDEN is presenting this as a claim because HOLDEN's amended petition assigned letters to what appear to be the claims. In the interests of thoroughness, Respondents are asking the Court to find that this claim, if an actual claim, is not properly before the Court.

CONCLUSION

For the above-stated reasons, the Court should grant Respondents' motion to partially dismiss.

DATED this 20th day of March, 2017

ADAM PAUL LAXALT
Attorney General

By: /s/ Michael J. Bongard
MICHAEL J. BONGARD (Bar NO. 07997)
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court by using CM/ECF system on March 20, 2017. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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/s/S. Summers
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